

REMARKS

Claims 1-13 are currently pending. Claims 1-7 have been amended, and claims 8-13 have been added. Support for the subject matter of claims 8-13 may be found in Fig. 2. Claims 1-7 have been rejected. Each of these rejections is addressed in detail below.

The Rejection Under 35 U.S.C. § 102(b)

In the Office Action, claim 1 was rejected under 35 U.S.C. § 102(b) as being anticipated by the Chin reference (U.S. Patent No. 6,374,129). With respect to the rejection of independent claim 1 under Section 102, the Examiner stated:

Chin discloses a method of using a pulse oximeter to determine a heart rate comprising determining a first heart rate from a pulse oximetry signal using a first method (element 70); determining a second heart rate from a pulse oximetry signal using a second method (element 74); evaluating a reliability of the first heart rate by applying metrics to the first method; and using the first heart rate when it is reliable, and the second heart rate when it is not (column 8 line 58 to column 9 line 7).

Office Action, pp. 2.

The Applicant respectfully traverses the rejection. Anticipation under section 102 can be found only if a single reference shows exactly what is claimed. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 U.S.P.Q. 773 (Fed. Cir. 1985). Accordingly, the Applicants need only point to a single element not found in the cited reference to demonstrate that the cited reference fails to anticipate the claimed subject matter.

In the present case, the Chin reference does not anticipate the Applicant's claims under Section 102 because every element of the claimed invention is not identically shown in Chin. Specifically, independent claim 1 recites a method for determining a heart rate in a

pulse oximeter that includes determining a heart rate using a first method, evaluating the heart rate for reliability, and using a second method for determining heart rate when the first method produces an unreliable heart rate.

In contrast to the Applicant's claims, the Chin reference discloses a system in which a first sensor may provide a first signal to a monitor, while a second sensor may provide a second signal to the monitor. Thus, the Chin reference does not disclose determining a heart rate using a first method applied to a signal and a second method applied to the same signal when the first method is unreliable.

For at least these reasons, the Applicant respectfully submits that independent claim 1 and the claims dependent thereon are not anticipated by Chin. Accordingly, the Applicant respectfully requests the withdrawal of the rejection of claim 1 under Section 102 based on Chin.

The Rejections Under 35 U.S.C. § 103

Claim 2 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Chin in view of Leon (U.S. Patent No. 5,365,934). Claims 3 and 4 were rejected under 35 U.S.C. § 103(a) as being obvious over Chin in view of Baker (U.S. Patent Publication No. 2002/0137994). Claims 5 and 7 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Zahorian (U.S. Patent No. 5,524,631) in view of Baker. Claim 6 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Zahorian in view of Baker, and in further view of Leon.

The burden of establishing a *prima facie* case of obviousness falls on the Examiner. *Ex parte Wolters and Kuypers*, 214 U.S.P.Q. 735 (PTO Bd. App. 1979). Accordingly, to establish a *prima facie* case, the Examiner must not only show that the combination includes *all* of the claimed elements, but also a convincing line of reason as to why one of ordinary skill in the art would have found the claimed invention to have been obvious in light of the teachings of the references. *Ex parte Clapp*, 227 U.S.P.Q. 972 (B.P.A.I. 1985).

The rejection of claims 2-7 under Section 103 is defective for at least the reasons set forth above with respect to the rejection of independent claim 1 under Section 102. Neither Chin nor the supporting references discloses a method or system in which a heart rate is determined using a first method applied to a signal and a second method applied to the same signal when the first method is unreliable. Accordingly, the combination of Chin with the supporting references cannot render the Applicant's claims obvious. Therefore, the Applicant respectfully asserts that the rejections of claims 2-7 under Section 103 are erroneous and should be withdrawn.

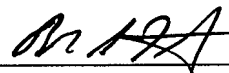
Conclusion

With respect to new claims 8-13, neither Chin nor the supporting references disclose a method or system in which a pulse period is determined using a first method applied to a signal and a second method applied to the same signal when the first method is unreliable. In view of the remarks set forth above, the Applicant respectfully requests reconsideration of the Examiner's rejections and allowance of all pending claims 1-13. If the Examiner believes

that a telephonic interview will help speed this application toward issuance, the Examiner is invited to contact the undersigned at the telephone number listed below.

Respectfully submitted,

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Michael G. Fletcher
Reg. No. 32,777
FLETCHER YODER
P.O. Box 692289
Houston, TX 77269-2289
(281-970-4545)